78-121

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

1978

NO._____

THEODORE THOMAS CURTIS, Petitioner

and

KEVIN ANDREW CURTIS, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF
CERTIORARI TO THE
UNITED STATES COURT
OF APPEALS FOR THE
NINTH CIRCUIT

ROBERT J. HOOKER
120 West Broadway
La Placita Village
Tucson, Arizona 85701
(602) 622-6708

ATTORNEY FOR PETITIONERS

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners, THEODORE THOMAS CURTIS and KEVIN ANDREW CURTIS, respectfully pray that a Writ of Certiorari issue to review judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceedings on October 12, 1977.

OPINION BELOW

The opinion of the Court of Appeals reported at 562 F.2d 1153 (9th Cir. 1977) appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on October 12, 1977. A timely Petition for Rehearing en banc was denied on March 10, 1978. The order of Modification of sentence was issued on April 3 , 1978.

It is strongly urged that this case be decided on the merits though not timely filed. In cases such as Heflin v. United States, 358 U.S. 415, and Taglianetti v. United States, 394 U.S. 316, n.1, where this Court noted that the time limitation "is not jurisdictional" and "does not bar our exercise of discretion to consider the case", the authority of this Court to waive the time limits has been made clear. In Arnold v. North Carolina, 376 U.S. 773, the petition was filed two weeks late and no extension had been sought nor had any extenuating circumstances been shown. However, this Court

granted the petition. Likewise, in Fuller v. Alaska, 393 U.S. 80, where the petition was filed a month after expiration of the time limits, this Court recognized the importance of resolving an issue of retroactivity and granted the petition in spite of its untimeliness.

This case raises the question of Fourth Amendment rights affected by the surreptitious implantation and use of electronic tracking devices in vehicles. In the instant case, there is a crucial need for review of this decision by the Ninth Circuit. In the Heflin, supra, case, an untimely petition was granted because the Court felt it necessary to resolve a split in the Circuits. Here, Also, the Circuits have reached opposite positions concerning the scope of the Fourth Amendment's protection. This is a crucial question which needs to be resolved promptly upon the merits because the use of secretly installed and judicially uncontrolled surveillance devices has become a widespread law enforcement practice. The validity of this practice has been upheld

in the Ninth Circuit and denied in the Fifth Circuit. This Court's guidance in the matter is an urgent necessity.

QUESTIONS PRESENTED

1. Whether the surreptitious installation and use of a transponder in the petitioners' aircraft without judicial approval or any subsequent judicial safeguards violated the petitioners' Fourth Amendment rights?

A. Whether the initial judicially unsupervised covert installation of the tracking surveillance device infringed upon petitioners' reasonable expectation of privacy, violating their Fourth Amendment rights?

B. Whether the judicially controlled continuous use of the tracking surveillance device constitutes an unreasonable invasion of petitioners' privacy violating their Fourth Amendment rights?

C. Whether consent to search may be given by the lessor of an aircraft when the lessee has finalized a lease agreement, has the paramount possessory interest in the airplane and is not involved in any joint enterprise with

the lessor?

D. Whether there was probable cause to implant the electronic surveillance device when the only facts known to the government agents were innocuous and susceptible of innocent construction?

2. Whether there was probable cause to search the vehicle of a co-defendant where there were few circumstances suggesting criminal activity and all were capable of reasonable innocent interpretation?

3. Whether there was sufficient evidence to sustain petitioners' conviction for possession of marijuana where there was no showing of actual or constructive possession as defined and demonstrated by previous court decisions?

STATEMENT OF THE CASE

Petitioner, Theodore Curtis, was an experienced pilot. He rented a Piper Navajo from ORCO Aviation and returned it on October 15, 1976. The general manager of ORCO suspected the plane had been used to transport marijuana.

When Mr. Curtis arranged to lease the plane again, the manager notified agents of the United States Customs Service of his suspicion. The general manager informed the agents that there were apparent discrepancies between the proposed itinary and fuel receipts, that seats in the airplane were removed and improperly reinstalled, and that the cabinet door was damaged. The manager later admitted that a change in the flight plan from a trip to New York to a trip to Las Vegas was probably communicated to him, thus accounting for the apparent fuel receipt discrepancy. Further, the manager also admitted that he had no knowledge of the condition the seats were in before the petitioner leased the plane. These seats were often removed and reinstalled by pilots flying patient transport for doctors.

On the basis of the above representations, on November 2, 1976, the Customs Agents obtained the permission of the manager to install the electronic tracking device, a transponder, in the aircraft. Despite the fact that a physical trespass was required and that there were absolutely no judicial guidelines to govern the procedure, a warrant was not obtained at any point.

On November 3, 1976, with the transponder in place, Theodore Curtis began a series of flights which were tracked by the transponder. On the evening of November 10, 1976, the plane was tracked in several flights, however, its signal was periodically lost. A Customs aircraft was dispatched to intercept the Piper Navajo, but it could not be located. Officers then went to an abandoned airstrip in the area. The Customs plane, equipped with an infrared surveillance device, arrived about 1:00 a.m., November 11, 1976. It detected a plane which could have been a Piper Navajo, although there was no way to confirm this for sure or to be certain that it was Mr. Curtis' plane. After the plane was

sighted, Customs Officers observed two land vehicles approach the parked plane. No activity between the aircraft and these vehicles was observed.

When the vehicles drove off, they were followed by the Customs aircraft. After the two separated, ground officials stopped the truck and camper, driven by Kevin Curtis. The officers searched the truck and seized approximately 400 pounds of marijuana.

Meanwhile, the aircraft belonging to Ted Curtis was traced to the Litchfield, Arizona, area. Customs Agents proceeded to Litchfield airfield and observed the Piper Navajo rented by Theodore Curtis. Agents approached the aircraft with weapons drawn and arrested the occupants. Theodore Curtis was arrested at this time.

On December 8, 1976, petitioners were indicted in the United States District Court, For the District of Arizona, for (1) Count I, conspiracy to violate 21 U.S.C. §295(a) and §960(a)(1), in violation of 21 U.S.C. 963; (2) Count II, importation, and aiding and

abetting in the importation of marijuana, in violation of 21 U.S.C. §952(a), and §960(a)(1) and U.S.C. §2; (3) Count III, possession with intent to distribute marijuana, in violation of 21 U.S.C. §841(a)(1) and (b), and 18 U.S.C. §2.

On January 24, 1977, petitioners brought motions for suppression of evidence and statements. The Honorable Russell E. Smith denied the motion to suppress the evidence seized from the vehicle driven by petitioner, Kevin Curtis; denied the motion to suppress evidence obtained by use of the transponder in the aircraft; granted the motion to suppress evidence seized from the aircraft; granted petitioners' motion to suppress incriminating statements; denied the motion to suppress co-defendant, John Dulin's, incriminating statements.

Following these rulings, the matter was submitted for trial to the Court on Count III of the indictment only on the basis of the record of the motions to suppress statements and a stipulation by counsel that the substance seized from the pickup truck and camper was 420 pounds of marijuana. On March 8, 1977, petitioners

were found guilty of Count III of the indictment.

On April 18, 1977, sentence was imposed and a timely appeal was filed. On October 12, 1977, an opinion affirming petitioners' conviction was filed. On November 14, 1977, a Petition for Rehearing en banc was filed. It was denied on March 10, 1978. The Court of Appeals relied upon United States v. Pretzinger, 542 F.2d 517 (9th Cir. 1976) for their decision concerning use of the transponder and its Fourh Amendment implications.

Petitioner, Theodore Curtis, sought a modification of his sentence on March 29, 1978. On April 3, 1978, an Order from the United States District Court of Arizona was issued modifying the petitioner's sentence so that he could serve a six-month term of incarceration in a half-way house type program instead of full institutional incarceration.

REASONS FOR GRANTING THE WRIT

1. This case brings squarely before the Court the question of Fourth Amendment rights affected by the surrepticious implantation and use of electronic tracking surveillance devices on motor vehicles generally and aircraft in particular. This decision by the Ninth Circuit Court of Appeals which is in direct conflict with that of the Fifth Circuit is domonstrative of the substantial practical need for authoritative guidance regarding this area from this Court. This guidance is especially crucial at a time when the sophistication of electronic surveillance devices threatens the most fundamental notions of privacy. Uniform Judicial Standards must be firmly established to protect individuals from the indiscriminate, continuous surveillance that scientific advances have made a reality.

A. The Ninth Circuit has held that government agents must obtain judicial approval in the form of a warrant, based on probable cause, if the planting of an electronic surveillance device entails intrusion into an area which is entitled to a reasonable expectation of

privacy under the Fourth Amendment. United States v. Pretzinger, 542 F.2d 517 (9th Cir. 1976); United States v. Hufford, 539 F.2d 32 (9th Cir. 1976). The placement of an electronic device in a protected area constitutes a "search". United States v. Pretzinger, supra. The crucial question in determining whether such a search has taken place is whether there was a reasonable expectation of privacy which was violated by the intrusion.

In United States v. Holmes, 521 F.2d 859 (5th Cir. 1975), the Court of Appeals dealt with this question in the context of a "beeper" (an electronic tracking device) affixed to the automobile in which certain suspects were riding. The Court recognized immediately that the installation of the tracking device was a search within the meaning of the Fourth Amendment. In doing so, it refuted the government's contention that the Appellants had no reasonable expectation of privacy when the automobile was parked in a public place or was moving about public highways. Relying on Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) the Fifth

Circuit stressed the fact that possible public accessability to the vehicle did not destroy the expectation of privacy:

> "When a person parks his car on a public way, he does not thereby give up all expectations of privacy in his vehicle. There is a right to be secure even in public."
> 521 F.2d at 864.

Katz, supra, is the most obvious example of this as a public telephone booth was involved.

The fact that the vehicle, while moving on the public highway, was easily observable likewise provided no justification for placing an electronic tracking device on the automobile. The Court felt that this was an intrusion beyond mere visual surveillance. It is a search at a time when an individual may reasonably expect to be alone in his car. The Court noted that few would argue that an individual by walking on a public street has given up his expectation of privacy so that secretly implanting a tracking device on his person would be unobjectionable from a privacy standpoint.

The Holmes Court then concluded by stating that the failure to obtain a warrant for installation of the tracking device was fatal to the search and the admissability of its fruits.

United States v. Hufford, 539 F.2d 32 (9th Cir. 1976) also dealing with the search of an automobile through use of a "beeper" reached the opposite conclusion. The Ninth Circuit Court of Appeals recognized that a search was involved, i.e., an "exploratory quest for evidence". However, the Court felt that there was no reasonable expectation of privacy. This belief was based upon the public nature of operating a vehicle on the public roads. Invoking Katz v. United States, supra, the Court noted that the driver of an automobile knowingly exposed his movements to the public and therefore was not entitled to Fourth Amendment protection.

The Court did realize, however, that a Fourth Amendment violation could occur while the "beeper" was being installed. When a second beeper was attached to a vehicle located in a

garage, drug agents obtained a warrant. Commenting on this procedure, the Court said:

> "Had the agents not resorted to a warrant, entrance into the garage and the opening of the truck's hood would have been an invasion of an area in which Hufford had a reasonable expectation of privacy."
>
> 539 F.2d at

Pretzinger, supra, apparently has extended the holding that motor vehicles are subject to "bugging" because of their use in public to include aircraft. Pretzinger, supra, was similar to the instant case in that a transponder was installed in an airplane which was suspected of transporting marijuana. The Court asserted its position that no reasonable expectation of privacy was violated, analogizing travel through airspace with an automobile traveling on the highway.

In the decision by the Ninth Circuit Court of Appeals in the instant case, United States v. Curtis, 562 F.2d 1153 (1977), the Court

was careful to point out the conflict in the Circuits, concerning the interpretation of the Fourth Amendment in the context of surrepticious electronic surveillance of vehicles:

> "The appellants vigorously complain that their Fourth Amendment guarantees were infringed by reason of the installation of the transponder and the introduction of evidence derived from its use. Their arguments bear considerable weight, having been adopted by the Fifth Circuit sitting en banc in United States v. Holmes, 537 F.2d 227 (5th Cir. 1976), affirming 521 F.2d 859 (5th Cir. 1975). Our Circuit, however, has adopted an approach contrary to that taken in Holmes. United States v. Pretzinger, 542 F.2d 519 (9th Cir. 1976), United States v. Hufford, 539 F.2d 32 (9th Cir. 1976) cert. denied 429 U.S. 1002, 97 S.Ct. 533, 50 L.Ed. 2d 614 (1976)." 562 F.2d at 1185.

The Honorable Judge Ely, in footnote 2, speaking for himself noted:

> "The author of this opinion joins his Brothers in resolving the questions relating to the transponder, but he does so only because he cannot logically distinguish Hufford and Pretzinger and thus believes that he had no choice save to abide by the decisions in those cases. If free to do otherwise, he would follow United States v. Holmes . . ." 562 F.2d at 1156.

It is apparent that the conflict in the Holmes decision with the Pretzinger, Hufford cases, line of cases places an extreme hardship on the judiciary and on the individuals whose Fourth Amendment rights are severely curtailed in the Ninth Circuit. Encroachment by sophisticated surveillance devices should be recognized as a threat to the privacy of the individual beyond anything imaginable in the last decade. Ours is an age in which the entire culture has been integrated with the necessity of transporting

one's self on public thoroughfares. It is more imperative than ever to protect the privacy that remains. The fact that our technological, transportation-orientated society has forced citizens to expose themselves to public view should not be used as a justification for further invading their remaining privacy.

B. The decision below also raises reoccurring questions as to the standards to be used and guidelines to be imposed for continuous use of surveillance devices. As the Ninth Circuit Court of Appeals noted in its opinion, law enforcement agencies should not have carte blanche power to conduct continuous surveillance of varying numbers of people. However, by upholding the placement of a monitoring device with no requirement of judicial safeguards, the Court has encouraged this type of conduct. Theoretically, surveillance could continue unchecked and unsupervised for months or years into the future. This type of surveillance could monitor an individual's every movement regardless of the continued existence or non-existence of the original cause for implanting the device.

Use of the "beeper" is a method of electronic surveillance much like the surveillance accomplished by wire taps. In that area, Congress was so concerned with surveillance that it regulated the use of wire taps in compliance with Katz, supra, 18 U.S.C. 2510, et seq. The instant case provides this Court with an opportunity to institute the guidelines necessary to prevent abuses of the Fourth Amendment inherent in unsupervised electronic surveillance of an individual's movement.

C. A related question in this area is one of consent. The lower Court ruled that the lessor of the aircraft had the authority to consent to the implantation of the tracking device even though the Appellant had finalized the lease agreement (562 F.2d at 1155, footnote 1). Appellant strongly asserts that this view is in direct conflict with the law in other analogous situations. This conflict should be clarified and resolved by this Court.

As the lessee of the aircraft, Mr. Curtis had an existing possessory interest in it. The manager of the airfield recognized this and

admitted that at the time of the implantation, the aircraft was "basically his plane and it was waiting for him to come and pick it up and fly off". (Reporter's Transcript, Volume I). This situation is clearly analogous to the landlord-tenant situation.

In Chapman v. United States, 365 U.S. 610 (1961), the owner of a house, suspecting that his tenant was engaged in illegal activity, consented to the police entering and searching the house. This Court held that the search was unconstitutional as a landlord has no right to consent to the search of the tenant's room. Stress was placed on the fact that Fourth Amendment rights should not hinge on property law distinctions.

This view was further reinforced by Stoner v. California, 376 U.S. 483 (1964), which extended the protection to a hotel room. The Court rejected the argument that ownership coupled with access for limited purposes during rental periods constituted authority to consent to a search. Stoner v. California, 376 U.S. at 489.

This is not a situation where there was a joint venture with the air service manager. Therefore, third party consent is invalid. By virtue of the lease agreement, Mr. Curtis had the sole possessory interest and he did not intend the manager to be a partner in it. The United States v. Matlock, 415 U.S. 164 (1974), and United States v. White, 401 U.S. 745 (1971), line of cases are inapplicable in this situation because the lessee was not sharing co-equal access to the plane. On the contrary, he had reserved it for himself only. The decision of the lower Court is in conflict with the applicable decisions of this Court concerning consent and therefore review is fully warranted.

D. The Appellant also asserts that there was no probable cause by which the implantation of the transponder could be justified. The lower Court's decision that there was probable cause stands in contrast to other decisions making a finding of probable cause.

A review of the information given to the government agents clearly indicates that a finding of probable cause was unwarranted.

According to the government agent, the reliable information which was given by the airport manager was (1) that discrepancies appeared to exist between the announced itinerary and fuel receipts; (2) the seats had been removed and reinstalled improperly; and (3) a cabinet door was damaged. The manager's belief that the propellers of the aircraft indicated use on an unimproved landing strip and that he observed a vegetable debris which might be marijuana seeds, was not conveyed to the government agents before they installed the transponder (Reporter's Transcript Volume I, 18, 80, 92-93). Each of these factors has been shown to be innocuous rather than suspicious. Mr. Curtis originally planned a trip to New York. However, the air service manager admits he was possibly told of Appellant's change in plans--a trip to Las Vegas. All fuel receipts reflect this trip to Las Vegas.

The manager was also not sure whether the seats of the airplane were properly installed when the Appellant rented the plane. The aircraft had been used by doctors transporting their patients and the seats were often removed and

reinstalled by the pilot.

The manager saw what he believed to be marijuana seeds in the plane. He described them as similar to popcorn seeds. Marijuana seeds are dissimilar to popcorn and no chemical test was performed on the seeds. In fact, this information was not given to the law enforcement agents until implanting the device had begun. At that time, the agent also observed a vegetable type of debris in the plane. He was not able to identify it as marijuana despite his extensive experience with drug-related offenses. Again, no chemical analysis was conducted. Also, a check of the Appellant's background revealed that he had no prior criminal record or activities.

Appellant feels that the case clearly shows there was not enough reliable information to constitute probable cause. Probable cause cannot be established by reliance on circumstances which are susceptible of a variety of credible interpretations not necessarily indicative of criminal conduct. United States v. Kandlis, 432 F.2d 132 (9th Cir. 1972). This Court should review the determination of the

lower Court that probable cause existed and reaffirm the holding of United States v. Kandlis, supra.

2. The lower Court also held that there was probable cause to search the pickup truck driven by Kevin Curtis. Petitioner, Theodore Curtis, has standing to attack the search as he was convicted of a possessory offense based on the contraband seized from Petitioner, Kevin Curtis. The decision of the lower court is in need of review as it is in conflict with the various decisions determining the presence of probable cause.

In order to justify this search, probable cause that the truck contained contraband must be established, Coolidge v. New Hampshire, 403 U.S. 443 (1971). This search cannot be justified as a search incident to arrest, as the co-defendant was lying on the ground, handcuffed, at gun point, some distance from the vehicle, Chimel v. California, 394 U.S. 752 (1969). Nor was it authorized by the driver's consent.

In examining the information available to law enforcement officials at the time, an

absence of probable cause is obvious. The agents lost the signal on Ted Curtis' plane on more than one occasion while attempting to track him, therefore, they could not be certain that the truck was actually near the Curtis airplane. Even if this information was available, there was no sign of the aircraft flying into Mexico. On the ground, there was no sign of suspicious activity such as loading or unloading. As noted before, the activities of Ted Curtis himself were innocuous rather than suspicious.

As the Court noted in United States v. Kandlis, supra, probable cause cannot be generated by circumstances, reliance upon which are "susceptible to a variety of credible interpretations not necessarily compatible with nefarious activity". See, also, United States v. Majourau, 474 F.2d 766 (9th Cir. 1973).

The instant case is clearly distinguishable from cases such as Pretzinger, supra, where marijuana seeds were positively identified in the interior of the plant; the plane was traced to Mexico; and bags were observed in the car that had met the plane. Likewise, in United States v.

Coplen, 541 F.2d 211 (9th Cir. 1976), it was established by visual observation that marijuana debris was in the aircraft which had been positively tracked into Mexico.

This Court should review the finding that probable cause to search the truck existed, in light of the paucity of circumstances indicating probable cause.

3. In this Appeal, petitioners contend as they did at the lower Court level, that there was insufficient evidence to convict them of possession of marijuana with the intent to distribute, 21 U.S.C. §841(a)(1). The conviction based on the evidence presented conflicts sharply with preceding decisions regarding sufficiency of evidence, in general, and the element of possession, in particular. Therefore, the authority of this Court is necessary to clarify and reaffirm the law in these areas.

As the preceding reviews of the evidence have shown, there was no way the government agents could be certain that they were constantly on the track of Theodore Curtis' plane. Assuming that it was his plane which made contact with the

pickup truck, there was no evidence that marijuana was loaded from the airplane to the truck or moved in any way. This is noteworthy considering the advanced surveillance in use--a forward look infrared device which can detect a human being on the ground from a height of 8,000 feet. The aircraft never crossed the border. No evidence of any marijuana residue, or anything else, was admitted into evidence from the plane.

In order to convict petitioners of the offense, possession must be proved. There is absolutely no evidence that petitioner, Theodore Curtis, was in actual possession of the marijuana which was seized from the camper. Therefore, if the conviction is sustainable, proof of constructive possession must be established. To prove constructive possession, the government must prove beyond a reasonable doubt that the accused knows of the presence of the drug and has the power to exercise dominion and control over it, Williams v. United States, 418 F.2d 159, 162 (9th Cir. 1969). Mere presence at the location of a controlled substance is not sufficient to prove possession. See, e.g., United States v.

Pruett, 551 F.2d 1365 (5th Cir. 1977); United States v. Castillo, 524 F.2d 286 (5th Cir. 1975); United States v. DiNovo, 523 F.2d 197 (7th Cir. 1975) cert. denied 423 U.S. 1016 (1975); Araujo-Lopez v. United States, 405 F.2d 466 (9th Cir. 1969). Likewise, proof of participation in a narcotics venture is not sufficient to support a conviction for possession in the absence of proof of dominion and control. United States v. Jackson, 526 F.2d 1236 (5th Cir. 1976). Presence in the area of contraband with awareness of its location is also insufficient to support a conviction for possession, if dominion and control is not proved. United States v. Maspero, 496 F.2d 1354 (5th Cir. 1974). In cases similar to this one, the evidence has been held insufficient to sustain a conviction. See United States v. Stroupe, 538 F.2d 1063 (4th Cir. 1976); United States v. Epperson, 485 F.2d 514 (9th Cir. 1973); United States v. Frol, 518 F.2d 1134 (8th Cir. 1975); United States v. Pretzinger, supra, 542 F.2d 517.

It is axiomatic that the prosecution must prove every element of the offense charged

beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). In order to support a conviction, inferences of guilt must be drawn from facts from which an innocent inference cannot reasonably be drawn. Mullaney v. Wilbur, 421 U.S. 684, 702 n.31, 95 S.Ct. 1881, 44 L.Ed.2d 408 (1975). In the instant case, considering the scanty evidence, the existence of alternative, reasonable inferences is obvious. Even assuming that petitioner's aircraft was the plane observed near the truck, it could have been summoned there on a pretext, and when the occupants were requested to transport the marijuana, they refused to comply.

In the instant case, the Court is urged to review the sufficiency of the evidence for a conviction of a possession offense. Petitioners submit that it is of crucial importance for this Court to re-establish the standards for proof of possession.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

ROBERT J. HOOKER
4th Floor Acapulco Bldg.
La Placita Village
120 West Broadway
Tucson, Arizona 85701
(602) 622-6708

Attorney for Petitioners

CERTIFICATE OF SERVICE

STATE OF ARIZONA)
) ss.
County of Pima)

I, ROBERT J. HOOKER, hereby certify that pursuant to Rule 33(3), Rules of Procedure for the United States Supreme Court, three (3) copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit were mailed to the Office of the Solicitor General, Room 5614, Department of Justice, Washington, D.C., on this the 18th day of July, 1978.

ROBERT J. HOOKER

SUBSCRIBED AND SWORN to before me, this 18th day of July, 1978, by ROBERT J. HOOKER.

NOTARY PUBLIC

My commission expires:

June 28, 1979

A P P E N D I X

UNITED STATES of America,

Appellee,

v.

Theodore Thomas CURTIS, Appellant.

UNITED STATES of America,

Appellee,

v.

Dale Peter CORDOVA, Appellant.

UNITED STATES of America,

Appellee,

v.

Kevin Andrew CURTIS, Appellant.

UNITED STATES of America,

Appellee,

v.

John Phillip Dulin, Appellant.

Nos. 77-2070/71, 77-2107 and
77-2235

United States Court of Appeals,
Ninth Circuit.

Oct. 12, 1977.

Defendants were convicted in the United States District Court for the District of Arizona, Russell E. Smith, Chief Judge, and C. A. Muecke, J., of possessing a quantity of marijuana with intent to distribute. Defendants appealed. The Court of Appeals, Ely, Circuit Judge, held that where officers had been given reliable information, based on articulable facts, that an airplane was being utlized in pursuit of criminal activity by a specific, identifiable individual, who had made arrangements to rent the plane, it was proper for the owner to arrange for installation, bu customs officials, of a transponder, an electric tracking device, although, in the ordinary case, secret surveillance devices in vehicles should be installed pursuant to court order under such reasonable time limitations and other restrictions as the court should, in the circumstances, reasonably impose.

Affirmed.

1. Criminal Law -- 520(2)
Simple representation to defendant, who was cooperative confessor, that fact of his cooperation would be made known to prosecuting authorities was insufficient to render his confession involuntary.

2. Aviation -- 245
Owner of airplane had right, before time for commencement of period of rental of the airplane to defendants, to install, through owner's agent, any instrument that would not be physically dangerous to occupants of the plane.

3. Customs Duties -- 126
Where officers had been given reliable information, based on articulable facts, that airplane was being utilized in

pursuit of criminal activity by specific, identifiable individual, who had made arrangements to rent the plane, it was proper for owner to arrange for installation, by customs officials, of transponder, an electric tracking device, although, in ordinary case, secret surveillance devices in vehicles should be installed pursuant to court order under such reasonable time limiataions and other restrictions as court should, in the circumstances, reasonably impose. U.S.C.A. Const. Amend. 4.

4. Searches and Seizures -- 3.3(7)
There was adequate probable cause for search of camper truck which approached parked airplane which had been under proper surveillance and remained by airplane for period of five or ten minutes, and for seizure of contraband being transported by the driver. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1); U.S.C.A. Const. Amend. 4. 2309

Appeal from the United States District Court for the District of Arizona.

Before ELY and CARTER, Circuit Judges, and ENRIGHT, District Judge.*

ELY, Circuit Judge:

The four appellants were charged and convicted of having possessed a quantity of marijuana with the intent to distribute the same, a violation of 21 U.S.C. § 841(a)(1). Other charges in the original indictment, conspiracy to import

*Honorable William B. Enright, United States District Judge, Southern District of California, sitting by designation.

marijuana and unlawful importation of marijuana, had been dismissed, pursuant to stipulation, prior to the nonjury trial. The appellants present four principal contentions:

(1) That the installation of a so-called transponder in a Piper Navajo aircraft, and the introduction of evidnece derived from the use of the transponder, constituted an infringement of the appellants' Fourth Amendment rights.

(2)That arresting officers did not have probable cause to stop and search a vehicle being driven by the appellant Kevin Curtis.

(3) That a confession made by the appellant Dulin was involuntary.

(4) That the prosecution's evidence was insufficient to support the convictions of the appellants Thomas Curtis, Cordova, and Dulin.

We pass an extended discussion in respect to the claim of inadequate evidence. If Dulin's confession was voluntary, there obviously was sufficient evidence to convict him. And if the evidence derived from the transponder and the marijuana revealed by the search were properly received, the evidence, considered as a whole and viewed in the light most favorable to the Government, was adequate to support the confictions of Cordova and Theodore Curtis.

[1] As to appellants' argument in respect to Dulin's confession, the argument has no merit. The trial judge made the determination that Dulin's confession was voluntary, and that finding must be upheld unless it can be said that the finding is clearly erroneous. United States v. Cluchette, 465 F.2d 749, 754 (9th Cir. 1972). The investigating officers twice gave Dulin the required warning

before Dulin made his admissions. Dulin argues that he was in fact promised, or thought he was promised, leniency in return for the admission. The record belies this contention. Dulin was not offered leniency. He was told only that it would be made known to responsible authorities that he had cooperated. Furthermore, Dulin admitted that he realized at the time he made his admissions that no promise was being made to him. A simple representation to a coopearating confessor that the fact of his cooperation will be made known to prosecuting authorities is insufficient to render a confession involuntary. United States v. Glasgow, 451 F.2d 557, 558 (9th Cir. 1971). The court's finding that Dulin's confession was voluntary is fully supported.

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While it is probably unnecessary, we briefly review the circumstances surrounding the installation of the transponder. The appellant Theodore Curtis (hereinafter Theodore) was an experienced aviator. ORCO Aviation, whose general manager at Riverside, California was one Joe Pagan, owned a Piper Navajo airplane. Theodore had rented the plane from October 4th to October 15th, 1976. When the aircraft was returned on the 15th of October, Pagan suspected that the plane had been used to transport marijuana. His suspicion was based on the following: (1) There were apparent discrepancies between the supposed itinerary of the aircraft and the receipts for the fuel that had been consumed; (2) some of the seats in the plane had been removed and improperly replaced; (3) one of the cabinet doors of the aircraft had been damaged; (4) there was vegetable debris in the plane that Pagan thought was marijuana; (5) the aircraft's propellers bore evidence that the

plane had been landed on at least an unimproved airstrip. On October 26, 1976 Theodore arranged with Pagan to rent the aircraft again. The period of rental was to be ten days, beginning on November 3, 1976, and Theodore deposited $300 to secure the arrangement. On November 1st, two days before this rental period was to commence, Pagan informed agents of the United States Customs Service of his suspicions. At the same time, he arranged for the installation by Customs officials of the transponder, an electronic tracking device, in the aircraft. The installation was made on the following day, November 2d, without prior judicial approval, while the plane still remained in the possession and control of Pagan, who, as has been noted, was the agent and general manager of the aircraft's owner. After Theodore took possession of the plane on November 3d, and during the period from that date to November 10th, various trackings of the aircraft's flights were made and recorded with the use of the transponder. The plane was tracked to the Litchfield Airport in Litchfield, Arizona, some ten to fifteen miles outside the City of Phoenix, where Theodore and Cordova was observed with the plane. The ship was also tracked to Phoenix, and in the early hours of November loth, the transponder's signals indicated that the plane was headed in the direction of the Mexican border. The signals from the transponder were lost when the plane was approximately forty miles north of the border, but at 2:40 a.m. on November 10th, at 9:20 p.m., signals reappeared as the plane proceeded toward the Mexican border. The signals were lost at the same place as before, but at 12:45 a.m. on November 11th, the signals reappeared and disclosed that the

aircraft was heading northerly, away from Mexico. The signals were tracked to the vicinity of Wenden, Arizona, and then lost. A Customs aircraft was dispatched for the purpose of intercepting the Piper Navajo, but the officials were unable to locate the Piper. The officers then proceeded in their aircraft to an abandoned airstrip about thirty miles from Wenden. The Customs plane was equipped with an infrared surveillance device, and at approximately 1 a.m., the Customs agents, with the use of this device, detected an airplane with the configuration of a Piper Navajo. The detected plane was parked on an abandoned airstrip. After this plane had been sighted, the Customs officers observed two land vehicles of normal size approach the parked airplane and remain for a period of five or ten minutes. The 2311 officers observed that neither the parked aircraft nor the land vehicles on the abandoned strip displayed any lights, and when the plane under observation took to the air at about 1:10 a.m., it did not utilize its running lights. The Customs officers, in their plane, briefly pursued the departing plane and then returned to observe the ground vehicles. These two vehicles remained parked for a moment and then proceeded toward an interstate highway. They traveled about one mile to the on-ramp of the highway before their headlights were turned on. The Customs airplane followed both of the vehicles until the latter separated, at which time the plane followed what the operators were then able to identify visually as a truck with a camper shell. he airborne agents contacted ground facilities and arranged that this truck be intercepted. Other agents, observed by officers in the Customs aircraft, intercepted the truck, which was being operated

by Kevin Curtis (hereinafter Kevin). Kevin was taken into custody. The officers searched the truck and found therein approximately 400 pounds of marijuana. The contraband was seized, and, over objection, eventually received as prosecution evidence.

[2,3] The appellants vigorously complain that their Fourth Amendment guarantees were infringed by reason of the installation of the transponder and the introduction of evidence derived from its use. Their arguments bear considerable weight, having been adopted by the Fifth Circuit sitting en banc in United States v. Holmes, 537 F.2d 227 (5th Cir. 1976), affirming 521 F.2d 859 (5th Cir. 1975). Our Circuit, however, has adopted an approach contrary to that taken in Holmes. United States v. Pretzinger, 542 F.2d 517 (9th Cir. 1976); United States v. Hufford, 539 F.2d 32 (9th Cir. cert. denied, 429 U.S. 1002, 97 S.Ct. 533, 50 L. Ed. 2d 614 (1976). Pretzinger, as does the case at hand, involved the installation of a transponder in an airplane suspected of being used for the smuggling of marijuana and the tracking of the plane to its rendezvous with two trucks. The facts in Pretzinger cannot logically be distinguised from those before us now, and the legal conclusions reached in Pretzinger, as well as in Hufford, are controlling precedents that compel the rejection of the appellants' Fourth Amendment claims in respect to the installation and use of the tracking device.[1]

1. The appellants have argued that Pagan had no authority to grant to the officers permission to install the transponder. They base this argument upon the fact that the agreement for the rental of the plane had been made prior to the transponder's installation. We reject the argument. The installation occurred before the time for the commencement of the rental period. The owner

of the plane had full control and dominion over it at the time, and it seems logical to us that the owner, through its agent, had the right at the time to install within its airplane any instrument that would not be physically dangerous to occupants of the plane.

The three judges here concerned wish to make it clear that in this age of ever-advancing sophistication in the development of electronic eavesdropping devices, they are not insensitive to unjustifiable intrusions on the right of privacy, a right that is deemed to be most precious to the American people. Law enforcement agencies should not have carte blanche power to conduct indiscriminate surveillance for unlimited periods of time of varying numbers of individuals. Our conclusion as to the propriety of the installation and use 2312 of the transponder in this case is predicated upon the peculiar facts and circumstances as a whole, particularly that here the officers, prior to the installation, had been given reliable information, based on articulable facts, that the plane was being utilized in the pursuit of criminal activity by a specific, identifable individual. Absent these considerations, and in the ordinary case, we are inclined to the view that secret surveillance devices in vehicles should be installed pursuant to court order, as in Hufford, under such reasonable time limitations as the court should, in the circumstances, reasonably impose.[2]

2. The author of this opinion joins his Brothers in resolving the questions relating to the transponder, but he does so only because he cannot logically distinguish Hufford and Pretzinger and thus believes that he had no choice save to abide by the decisions in those cases. If free to do otherwise, he would follow United States v. Holmes, 521 F.2d 859

(9th Cir. 1975), aff'd en banc, 537 F.2d 227 (9th Cir. 1976). See also, United States v. Bobisink, 415 F.Supp. 1334 (D.Mass.1976). Writing in this footnote for himself only, he expresses his opinion that the reasoning of Holmes is more logical and precise than that set forth by our court in Hufford and Pretzinger.

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[4] Finally, we hold that there was adequate probable cause for the search of the camper truck being operated by Kevin and the seizure of the contraband that he was then transporting. See, United States v. Coplen, 541 F.2d 211, 215 (9th Cir. 1976), cert. denied, 429 U.S. 1073, 97 S.Ct. 810, 50 L.Ed.2d 791 (1977), and United States v. Young, 535 F.2d 484, 487-88 (9th Cir.), cert. denied, 429 U.S. 999, 97 S.Ct. 525, 50 L.Ed.2d 609 (1976). Cf., United States v. Patterson, 492 F.2d 995, 997 (9th Cir.), cert. denied, 419 U.S. 846, 95 S.Ct. 82, 42 L.Ed.2d 75 (1974).

The judgments of conviction are AFFIRMED.